United States Department of Labor
Employees' Compensation Appeals Board

A.N., Appellant	)	
and	)	**Docket No. 09-798**
	)	**Issued: October 27, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Norman McNulty, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 30, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 10, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on February 27, 2008.

FACTUAL HISTORY

On February 27, 2008 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries on that date from a motor vehicle accident while in the performance of duty. She indicated the time of the incident was 11:30 a.m. The supervisor's report on the reverse of the claim form stated that appellant was on lunch break and in her own personal vehicle. The report also stated that James Gillispie, a supervisor, did not send appellant to pick up his lunch as alleged.

In a statement dated March 21, 2008, appellant alleged that she was instructed by Diane Turner, a supervisor, to get lunches at Red Lobster in her own vehicle because there were no employing establishment vehicles available. She indicated the motor vehicle accident occurred as she was waiting to turn into the Red Lobster parking lot. Appellant also submitted a March 17, 2008 statement indicating she was filing a grievance against Ms. Turner and Mr. Gillispie for making false statements. She stated that she was instructed by Ms. Turner at 11:00 a.m. to pick up lunch for Mr. Gillispie and Ms. Turner. Appellant alleged that Ms. Turner had already placed the order for lunch under Mr. Gillispie's name and she gave appellant $35.00 to pay for the order. She noted that her clock rings show that she normally took lunch at 1:30 or 2:00 p.m.

In an undated statement, Ms. Turner denied telling appellant to get lunch. She stated that there were employing establishment vehicles available if she would have been instructed to get the supervisor's lunch.

By decision dated April 24, 2008, the Office denied the claim for compensation. It found appellant was not in the performance of duty at the time of the incident.

Appellant requested a hearing before an Office hearing representative and submitted additional evidence. A hearing was held on August 20, 2008. In a statement dated July 17, 2008, a coworker, Ms. Chaney, stated that on February 27, 2008 she heard Ms. Turner, after speaking to appellant on the telephone and learning of the accident, tell another supervisor that appellant had an accident going to Red Lobster "for her (Diane Turner)." In a July 21, 2008 statement, a coworker, Ms. Rodriguez, stated that on February 27, 2008 she heard Ms. Turner tell a coworker "I sent [appellant] to get my lunch from Red Lobster and on the way she got hit by a car."

The record contains an October 6, 2008 arbitrator's decision in a grievance filed by appellant. The arbitrator stated that the evidence did not support Ms. Turner's denial of instructing appellant to leave the premises to get lunch for the supervisors. According to the arbitrator appellant's testimony was detailed and credible regarding the incident, and "it is clear that Ms. Turner did instruct [appellant] to pick up lunch at Red Lobster."

In a statement dated October 16, 2008, Mr. Gillispie stated that the witnesses did not hear Ms. Turner instruct appellant to get lunch. He stated that there were employing establishment vehicles available, but appellant used her own vehicle.

By decision dated November 10, 2008, the hearing representative affirmed the denial of the claim. The hearing representative accepted that appellant was instructed to get lunch at Red Lobster, but found that she was not in the performance of duty as there was no substantial employer benefit or employment requirement that gave rise to the injury.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[1] The phrase "sustained while in the performance of duty" in the Act is

[1] 5 U.S.C. § 8102(a).

regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment."[2]

To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he may reasonably be expected to be in connection with the employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[3]

It is well established that for employees having fixed hours and a place of work, injuries occurring off premises while coming and going to and from work before or after work hours, or at lunch time, are not compensable, subject to several exceptions.[4] In addressing one exception to the coming and going rule, Larson describes the special errand rule as "When an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey; or the special inconvenience, hazard; or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."[5]

ANALYSIS

The record indicates that in this case appellant was an employee with fixed hours and place of work. On February 27, 2008 she left the employing establishment premises during work hours to travel to a Red Lobster restaurant. The hearing representative accepted that appellant was directed by her supervisor, Ms. Turner, to retrieve lunch for her supervisors. This factual finding is supported by the evidence of record. While Ms. Turner denied instructing appellant to go to Red Lobster, there were witnesses who heard Ms. Turner state to others that she had sent appellant to the restaurant. Appellant herself provided a detailed statement regarding the incident, and an arbitrator reviewed evidence and testimony and concluded that appellant had been instructed by Ms. Turner to leave the premises to get lunch for the supervisors.

An employee who leaves the employing establishment premises in her personal vehicle to travel to a restaurant during a lunch hour would normally be outside of coverage under the Act, pursuant to the coming and going rule. In this case, however, the employee was not on her lunch hour, going to a restaurant to eat lunch. Appellant was directed by her supervisor to procure lunch for her supervisors. She was specifically given a task by her supervisor that required her to leave the premises. Pursuant to a special errand, appellant's travel to and from the special errand brings her in the course of employment. As the Board has noted, "the essence of the [special

[2] *Valerie C. Boward*, 50 ECAB 126 (1998).

[3] *R.A.*, 59 ECAB ___ (Docket No. 07-1814, issued June 19, 2008); *Mary Keszler*, 38 ECAB 735 (1987).

[4] A. Larson, *The Law of Workers' Compensation* § 13.00 (2007).

[5] *Id.* at § 14.05.

errand] exception is not found in the fact that a greater or different hazard is encountered, but in the agreement to undertake a special task."[6]

Appellant undertook a special task as directed by her supervisor and she is covered while coming and going to perform the task. There was no evidence presented that she had deviated from her special errand. Appellant was waiting to turn into the parking lot at Red Lobster when the motor vehicle accident occurred on February 27, 2008.

In her November 10, 2008 decision, the hearing representative refers to a lack of a substantial employer benefit or employment requirement. This language was initially used in a case involving an employee who arrived an hour and half prior to her starting time to eat breakfast at an employing establishment sponsored club on the premises.[7] As Larson explains, certain employee sponsored recreational or social activities, such as a company picnic, may be in the course of employment if held on the premises, the employer requires participation or derives substantial direct benefit from the activity.[8] The present case involves an employee who was directed to undertake a special task that required her to leave the premises. The Board finds appellant is within the special errand exception to the coming and going rule. The case will be accordingly be remanded to the Office to consider the medical evidence.

CONCLUSION

The Board finds that appellant was performing a special errand on February 27, 2008 when she was involved in a motor vehicle accident, and the case will be remanded to determine if the medical evidence establishes an injury causally related to the incident.

[6] *Asia Lynn Doster*, 50 ECAB 351 (1999); *Elmer L. Cooke*, 16 ECAB 163 (1964).

[7] *Nona J. Noel*, 36 ECAB 329, 331 (1984).

[8] A. Larson, *The Law of Workers' Compensation* § 22.00 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 10 and April 24, 2008 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 27, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board